IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN SWANSON,	:	
Plaintiff,	:	
	:	**CIVIL ACTION NO. 05-CV-3054**
	:	
	:	
NORTHWESTERN HUMAN SERVICES, INC.,	:	
	:	
Defendant.	:	

AMENDED MEMORANDUM

Tucker, J. **November 30, 2006**

Presently before this Court is Defendant's Motion for Summary Judgment (Doc. 10). For the reasons set forth below, upon consideration of Defendant's Motion, Plaintiff's Response (Doc. 11), and Defendant's Reply to Plaintiff's Response (Doc. 13), this Court will grant Defendant's Motion for Summary Judgment.

BACKGROUND

From the evidence of record, taken in a light most favorable to the Plaintiff, the pertinent facts are as follows. On March 1, 2004, Plaintiff John Swanson was employed as a Certified Addiction Counselor/Mentor by Defendant Northwestern Human Services, Inc., ("Northwestern"). Plaintiff was hired with a probationary period to last for six months, until September 1, 2004. One of Plaintiff's supervisors while employed by Northwestern was Dr. Julia Rafsky ("Dr. Rafsky"). In June of 2004, Plaintiff and Dr. Rafsky held their first supervisory meeting, which was behind closed doors in a small office. (Compl., p. 4). Upon entering the office, Dr. Rafsky told Plaintiff that he "looked good in [his] jeans." (Def.'s Reply to Pl.'s Resp., p. 4). As Plaintiff was leaving the supervisor meeting, Dr. Rafsky grabbed his buttocks. Shortly thereafter, Dr. Rafsky

asked Plaintiff to go out with her on dates. Plaintiff rejected Dr. Rafsky's advances, stating that he was engaged and committed to his fiancee. (Pl.'s Resp., p. 5).

Shortly thereafter, Plaintiff attempted to tell his team leader, James Bryant ("Bryant") about the incidents. Bryant laughed and giggled but did not address the matter. (Pl.'s Resp., p. 6). In subsequent supervisory meetings, Dr. Rafsky made negative comments to Plaintiff about his work performance, claiming that his documentation was insufficient, memoranda incomplete and his work with the therapy groups inadequate. Dr. Rafsky also demanded the submission of additional documentation and re-writes of submitted memoranda. (Pl.'s Resp., pp. 6-7).

On or about July 7, 2004, Dr. Rafsky issued a written (disciplinary) warning to Plaintiff, alleging deficient performance. On or about July 13, 2004, Plaintiff complained to Rhea Fernandez ("Fernandez"), Northwestern's Program Director, about Dr. Rafsky's alleged sexual advances and conduct. Thereafter, Dr. Rafsky was removed from direct supervision of Plaintiff. (Pl.'s Resp. , p 7).

Plaintiff's sexual harassment complaint was investigated by Mark A. Karpinski ("Mr. Karpinski") a member of the Compliance Department. Mr. Karpinski determined that the sexual harassment complaint was unfounded. (Pl.'s Resp., pp. 8-9). Subsequently, in a memorandum, Plaintiff requested that Dr. Rafsky's write-up be removed from his personnel file. On or about August 31, 2004, Plaintiff was advised by Northwestern's Human Resources Office that his probationary period of employment ended on August 31, 2004, and that Human Resources would determine if it would be extended. On September 1, 2004, Plaintiff filed a complaint with the EEOC. By memorandum dated September 3, 2004, Plaintiff was notified that his probationary

period would be extended. By letter dated October 1, 2004, Plaintiff resigned from his position. (Pl.'s Resp., pp. 10-11).

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c)). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "[I]f the opponent [of summary

judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

DISCUSSION

A. Count I - Sexual Harassment

Title VII makes it unlawful for any employer "to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2 (a)(1). "A plaintiff who claims that she has been sexually harassed has a cause of action under Title VII if the sexual harassment was either a quid pro quo arrangement, or if the harassment was so pervasive that it had the effect of creating an intimidating, hostile, or offensive work environment." Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). Here, Plaintiff asserts a hostile work environment claim.

To establish a claim for a hostile work environment, plaintiff must establish that: (1) he suffered intentional discrimination because of his gender; (2) the discrimination was pervasive and regular; (3) the discrimination affected him; (4) the discrimination would detrimentally affect a reasonable person of the same gender in that position; and (5) respondeat superior liability applies. Andrews, 895 F.2d at 1482. "When determining whether an environment is sufficiently hostile or abusive, the court must look at the totality of the circumstances." Id. Defendant contends that Plaintiff is unable

to establish the second and fourth prongs needed to sustain a hostile work environment claim. (Def.'s Reply. Br., p.7).

"A hostile work environment exists when a workplace is permeated with discriminatory intimidation, ridicule and insult so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." WarmKessel v. East Penn Mfg., No. 03-02941, 2005 U.S. Dist. LEXIS 15048, at *7-8 (E.D. Pa. July 28, 2005). In order to satisfy the pervasive and regular discrimination requirement, "a plaintiff must show that the incidents of harassment occur either in concert or with regularity." Andrews, 895 F.2d at 1484. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Shramban v. Aetna, 115 Fed. Appx. 578, 580 (3d Cir. 2004).

In support of this claim, Plaintiff alleges that within a two months period: (1) Dr. Rafsky told him that he looked good in his jeans on one occasion, (2) grabbed his buttocks on one occasion and (3) asked him on dates. Plaintiff has not alleged how often the request for dates occurred during the two months. Plaintiff also asserts that after he rebuffed Dr. Rafsky's advances, she criticized his work, demanded re-writes of submitted documents and issued a negative report.

Plaintiff has failed to offer evidence sufficient to show that the comments and actions identified by Plaintiff occurred either in concert or with regularity sufficient to establish a hostile work environment claim. Dr. Rafsky's single unwelcomed contact with Plaintiff's buttocks and comment that Plaintiff "looked good in his jeans," albeit inappropriate, does not rise to the level of severity required under the law to make a

claim for hostile work environment. Further, Dr. Rafsky's requests for dates were not pervasive and regular as plaintiff has offered no evidence that the requests for dates occurred regularly or more than twice. See, e.g., McGraw v. Wyeth-Ayerst Lab., No. 96-5780, 1997 U.S. Dist. LEXIS 20813, at * 16-18 (E.D. Pa., Dec. 30, 1997) (supervisor's repeated requests for date, kissing Plaintiff without her consent, "forcing his tongue into her mouth" on one occasion, and touching Plaintiff's face not severe enough to create hostile work environment); Bauder v. Wackenhut Corp., No. 99-1232, 2000 U.S. Dist. 4044, at *13 (E.D. Pa. March 23, 2000) (allegations that supervisor grabbed plaintiff's buttocks and male co-workers discussed the location of plaintiff's tattoos were insufficient to establish a hostile work environment); Saidu-Kamara v. Parkway Corp., 155 F. Supp. 2d 436 (E.D. Pa. Aug. 13, 2001) (no hostile work environment where plaintiff's supervisor patted employee on buttocks and breast on one occasion and propositioned her on several occasions). Accordingly, Plaintiff in this matter has failed to present evidence sufficient to establish the pervasive and regular prong of the Andrews test. Further, this Court concludes that Plaintiff has failed to show that the harassment that he suffered was so pervasive and regular as to change the conditions of employment of a reasonable person in Plaintiff's position. Accordingly, this Court will grant Defendant's Motion for Summary Judgment regarding plaintiff's hostile work environment claim.

B. Count II - Sex Discrimination

To establish a prima facie case of sex discrimination under Title VII, plaintiff must show that: (1) he is a member of a protected class or minority group; (2) he was qualified for the position at issue; (3) he suffered an adverse employment decision; and

(4) the position was ultimately filled by a person not of the protected class, or that similarly situated non-protected persons were treated more favorably. See Bauder v. Wackenhut Corp., No. 99-1232, 2000 U.S. Dist. LEXIS 4044, at *6-7 (E.D. Pa. March 23, 2000). Defendant contends that Plaintiff has failed to establish a prima facie case of discrimination on the basis of sex because he has not alleged that similarly situated non-protected persons were treated more favorably or presented evidence sufficient to establish that he suffered any adverse employment decision. (Def.'s Reply Br., p.7).

Plaintiff has failed to provide this Court with any evidence that a female employee who was similarly situated was treated more favorably or allege that he was replaced by an individual outside of his class. Accordingly, Plaintiff has failed to establish a prima facie case of discrimination on the basis of sex. See, e.g., Dill v. Runyon, No. 96-3584, 1997 U.S. Dist. LEXIS 4355 (E.D. Pa. April 3, 1997) (employee failed to establish a prima facie case of discrimination on the basis of sex because he did not show that similarly situated non-protected persons were treated more favorably); Bauder, 2000 U.S. Dist. LEXIS 4044, at *9-10 (plaintiff unable to establish a prima facie case of discrimination where plaintiff failed to show that similarly situated non-protected persons were treated more favorably than plaintiff). Inasmuch as Plaintiff has failed to offer any evidence to satisfy the fourth prong, it is unnecessary to address whether Plaintiff can satisfy the other three prongs. Accordingly, this Court will grant Defendant's motion for summary judgment and dismiss Count II of Plaintiff's complaint.

C. Count III - Retaliation

In Count III of Plaintiff's Complaint, he alleges that Defendant retaliated against him in violation of the Pennsylvania Human Relations Act ("PHRA"). Plaintiff also

reasserts a claim for sex discrimination and sexual harassment under the PHRA. Claims brought pursuant to the PHRA should be interpreted consistently with Title VII. See Weston v. Commonwealth of Pennsylvania, Dept. of Corrs, 251 F.3d 420 (3d Cir. 2001). Inasmuch as Plaintiff's sex discrimination and sexual harassment claims discussed above failed under Title VII, they fail under the PHRA.

To establish a prima facie case of retaliation, plaintiff must show that (1) he engaged in a protected employee activity; (2) that defendant took an adverse employment action after, or contemporaneous with, plaintiff's protected activity; and (3) a causal link exists between plaintiff's protected activity and defendant's adverse action. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000). Defendant contends that Plaintiff failed to offer evidence that he suffered an adverse employment action. This Court agrees.

In support of this claim, Plaintiff's asserts that his constructive termination constitutes the adverse employment action. Specifically, Plaintiff alleges that after he complained to Fernandez and contacted the EEOC, he was told, on September 3, 2004, that his probationary period would be extended. Thereafter, he resigned.

To find constructive discharge, a court needs to find that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Angeloni v. Dioces of Scranton, 135 Fed. Appx. 510, 513 (3d Cir. 2005). "Although no findings of a specific intention on the part of the employer to bring about a discharge is required, a plaintiff must establish that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Clancy-Fisher v. City

of Philadelphia, No. 02-3713, 2002 U.S. Dist. LEXIS 22270 at *9 (E.D. Pa. Oct. 31, 2002).

Reviewing the evidence, the Court concludes that Plaintiff has failed to sufficiently allege a claim of constructive discharge. After Plaintiff complained to Fernandez about Dr. Rafsky's comments and actions, Dr. Rafsky was immediately removed as plaintiff's supervisor and the complaint was investigated. Plaintiff has not demonstrated that Defendant knowingly permitted alleged conditions of discrimination in employment that were so intolerable that a reasonable person subject to them would resign. Accordingly, Plaintiff's constructive discharge claim fails. Inasmuch as Plaintiff's constructive discharge claim fails, he cannot establish a prima facie case of retaliation. Accordingly, defendant's motion for summary judgment is granted and Count III of Plaintiff's complaint is dismissed.

D. Count IV - Intentional Infliction of Emotional Distress ("IIED")

"A plaintiff must establish four elements to state a claim for IIED: (1) the conduct of the defendant must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) the conduct must cause emotional distress; and (4) the distress must be severe." Harry v. City of Philadelphia, No. 03-661, 2004 U.S. Dist LEXIS 11695, at *50 (E.D. Pa. June 18, 2004). Further, "as a general rule, sexual harassment alone does not rise to the level o[f] outrageousness necessary to make out a cause of action for intentional infliction of emotional distress." Pacheco v. Kazi Foods of New Jersey, Inc, No. 03-02186, 2004 U.S. Dist. LEXIS 11280, at *14-15 (E.D. Pa. Apr. 7, 2004). "The extra factor that is generally required is retaliation for turning down sexual propositions." Andrews, 895 F.2d at 1487. Defendant contends that Claim IV of the Complaint

alleging IIED must be dismissed because it is preempted by the Pennsylvania Workers' Compensation Act ("PWCA").

Contrary to Defendant's assertion, Plaintiff's claim is not barred by the PWCA. The Pennsylvania Supreme Court has held that the PWCA will not bar an action for intentional infliction of emotional distress where the injury to the employee arose from harassment which was personal in nature and was not a proper part of the employer-employee relationship. Hoy v. Angelone, 720 A.2d 745 (Pa. 1998). Furthermore, a legally cognizable claim for intentional infliction of emotional distress must be based upon conduct that "was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Id. at 754; see also Merritt v. D.E. River Port Auth., No. 98-3313, 1999 U.S. Dist. LEXIS 5896, at *22 (E.D. Pa. Apr. 20, 1999) (intentional infliction of emotional distress claim due to sexual harassment is not barred by PWCA); Lang v. Seiko Instr. USA, No. 96-5398, 1997 U.S. Dist. LEXIS 167 (E.D. Pa. Jan. 14, 1997) (intentional infliction of emotional distress claim not barred by PWCA). Accordingly, this Court finds that Plaintiff's claim is not automatically barred by the PWCA.

However, this Court rejects Plaintiff's IIED claim because Dr. Rafsky's alleged conduct, i.e, grabbing of Plaintiff's buttocks on one occasion and requests for dates, while unacceptable, does not rise to the level of outrageousness for an IIED claim. Compare Merritt, 1999 U.S. Dist. LEXIS 5896, at *22 (conduct sufficient to establish IIED claim where co-worker touched plaintiff's genitals on many occasions, exposed himself to plaintiff, engaged in masturbation while calling plaintiff's name, crept up

behind plaintiff and thrust his hips against plaintiff's buttocks, simulating a sexual act, and looked under bathroom stalls when plaintiff was using the bathroom), *with* DiFlorio v. Nabisco Biscuit Co., No 95-0089, 1995 U.S. Dist. LEXIS 6356 (E.D. Pa. May 12, 1999) (sexual conversation and conduct, i.e., requesting dates, making inappropriate comments and touching plaintiff 's thigh, do not constitute the type of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress due to sexual harassment in the workplace).

Further, based on the record there is no evidence that Northwestern acted improperly. After Plaintiff complained to Fernandez, Dr. Rafsky was immediately removed as his supervisor and Plaintiff's complaint was investigated. See Merritt, 1999 U.S. Dist. LEXIS 5896, at *20-21 (company liable under IIED claim where employee reported co-worker's outrageous conduct and supervisor reacted with inaction and efforts to hide the conduct by asking employee to remain quiet). In addition, Plaintiff does not allege or argue any specific incidents of retaliation in his memorandum or Complaint to support this claim. (See Pl.'s Reply Br., p. 25-29; Compl., p. 10-12). Accordingly, summary judgment is granted on Count IV of Plaintiff's complaint.

E. Negligence

Last, Defendant asserts that Plaintiff's negligence claim is barred by the PHRA. "Where plaintiff's negligence claim is more precisely a claim for negligent supervision because the claim essentially alleges failure to train, supervise and investigate, the claim is preempted by the PHRA." Warmkessel, 2005 U.S. Dist. LEXIS 15048, at *23; Stell v. PMC Techs., Inc, No. 04-5739, 2005 U.S. Dist. LEXIS 18093, at *6 (E.D. Pa. Aug. 24, 2005). Plaintiff's negligence claim is a claim for negligent supervision because he

essentially alleges that Defendant failed to properly train its employees on sexual harassment and failed to properly investigate plaintiff's allegations of harassment. As such it is preempted by the PHRA, and must be dismissed as a matter of law. Thus, defendant's motion for summary judgment is granted and Count V of Plaintiff's complaint is dismissed.

CONCLUSION

For the foregoing reasons, this Court will grant Defendant's Motion for Summary Judgment. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN SWANSON,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	

	:	
v.	:	**NO. 05-CV-3054**
	:	
NORTHWESTERN HUMAN SERVICES, INC.,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this ____ day of November, 2006, **IT IS HEREBY ORDERED** and **DECREED** that this Court's Memorandum (Doc. 14) is amended to reflect the following change on page six (6), paragraph one (1):

> Accordingly, this Court will grant Defendant's Motion for Summary Judgment regarding plaintiff's hostile work environment claim.

BY THE COURT:

/s/ Petrese B. Tucker

_____

Hon. Petrese B. Tucker, U.S.D.J.